## BRIEF

### In Support of the Foregoing Petition for a Writ of Certiorari.

A Government reprint of Section 75 precedes this brief.

### I.

### Index.

The index precedes the Petition for Certiorari.

### II.

### The Report of the Opinion Below.

The opinion of the appellate court below is reported as *Kalb* v. *Yellow Manufacturing Acceptance Corporation,* 127 Fed. (2d) 511, decided April 20, 1942. R. 30 to 33.

The District Court below issued no opinion. Its final order is at R. 17 and 18, beginning at folio 21.

### III.

### The Grounds on Which the Jurisdiction of This Court Is Invoked.

The grounds for invoking the jurisdiction of this court ar stated in the Petition at page 2 and at pages 6 to 14.

### IV.

### A Concise Statement of the Case.

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### Proceedings Preliminary to the Origin of the Issues Here Raised.

The petitioner filed his farmer debtor petition and schedules under Section 75 and listed the secured debt and the

mortgaged trucks which are involved here. R. 5. See Schedule A-2 at the bottom of R. 7 and the top of R. 8, and Schedule B-2 G at R. 10.

On June 25, 1941, he filed his proposal to creditors with the conciliation commissioner. R. 13 to 15.[2]

On July 1, 1941, the first creditors' meeting was held before the conciliation commissioner. R. 4, folio 5, entry of July 1, 1941.

At this creditors' meeting, the real estate mortgage holders filed a petition to strike the mortgaged real estate from the schedules and for leave to proceed with foreclosure. (This petition was later referred to the Judge of the district court where it was denied. On appeal the district court affirmed. *Feuerstein* v. *Kalb*, C.C.A. 7 (1942), 127 Fed. (2d) 509.)

The proposal to creditors was not considered. Nothing further was done at the creditors meeting before the conciliation commissioner which was adjourned indefinitely and later held in abeyance before the district court pending the final determination of this cause.

On July 21, 1941, the clerk by letter notified counsel for the petitioner that the application to strike the real estate would be heard by the Judge on August 4, 1941. R. 17.

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2 Although R. 13 shows that this proposal was "Filed December 4, 1941", this date is not the date of filing with the conciliation commissioner but the date when the conciliation commissioner's papers were filed with the clerk for the purpose of making up the transcript of the record on appeal. See paragraph number 9 of the designation at the top of R. 23.

On July 30, 1941, nine days after the clerk's notice by letter and twenty-one days after the creditors' meeting there was filed with the clerk an application for an order that the petitioner surrender his trucks to the Yellow Manufacturing Acceptance Corporation, the respondent here.[3] R. 2, entry of July 30, 1941. The petitioner and his counsel had no knowledge of this. R. 19, paragraph 1 and paragraph 6.

On August 4, 1941, the Judge being absent, the said real estate hearing set for that date was continued to the next day when it was heard.

**The Origin of the Issues Here Raised.**

Neither the petitioner nor his counsel had any notice or knowledge on August 5, 1941, that an application for the surrender of the trucks to the respondent had been filed with the clerk or was to be heard. As just stated above, it was not filed until nine days after the notice of hearing on the real estate matter was given. R. 17. R. 2, entry of July 30, 1941. The first information they had of its filing was when, after the application to strike the real estate had been presented and taken under considera-

[3] The conciliation commissioner's docket entries at R. 4 and 5 seem to show, at the top of R. 5, that at the creditors' meeting on July 1, a petition of the Yellow Manufacturing Acceptance Corporation was "filed in writing with the commissioner and referred to the . . . Judge of the District Court." It was not then filed or referred. The final order of the district court at R. 17, folio 21, recites that the petition of the YMAC was "verified on the 17th day of July, 1941" which was eighteen days after the creditors' meeting on July 1. The clerk's docket entries at R. 2, at the bottom of the page show: "July 30, 1941—Petition of Adolph Mandelker, on behalf of Yellow Mfg. Co., for an order that debtor return certain vehicles, rec'd. from Con. Com., filed." That is, the petition seeking the final order was not forwarded by the conciliation commissioner until twenty-nine days after the creditors' meeting on July 1 and nine days after the clerk's notice of hearing on the real estate petition.

Therefore if such a petition by the YMAC was ever filed with the conciliation commissioner, it was not filed on July 1, 1941, at the creditors' meeting but on some date from July 19 to 30 and it was not in existence on July 1. The appellate opinion says it was filed with the conciliation commissioner on July 20. R. 30, second paragraph.

tion, counsel for the respondent arose and presented the petition of the respondent to the Judge and requested an order thereon.

What followed is here copied from the "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941" filed later on October 30, 1941. R. 18 to 20, paragraph 6:

> "On said day of August 5, 1941, said Adolph I. Mandelker, as attorney for said Yellow Manufacturing Acceptance Corporation, presented said petition and motion to the judge. Whereupon the judge of said court asked counsel for said farmer debtor whether he had anything to say on behalf of the farmer debtor. Counsel for said farmer debtor thereupon addressed the court and said that no notice of the filing of said petition and motion had ever been given to or served upon the farmer debtor or his counsel and none of them had any knowledge of such filing; and further that no notice or knowledge had ever been given to or been possessed by said farmer debtor or his counsel that said motion or petition was set down for hearing or would be heard at any time or place; and further that said farmer debtor would not submit himself personally or by counsel to the jurisdiction of the court over the person or subject matter in relation to the said petition and motion; and further that for the court to take any action upon said petition and motion as so presented would deprive the farmer debtor of his constitutional right to have due process of law."

Nothing further was heard of the matter by the petitioner or his counsel until October 23 when a letter was received by his counsel from respondents' counsel and a copy of the order entered October 20 was served on him. R. 20, paragraph 7. The operative portion of this order reads:

> "Ordered that the prayer of said petition be and it is hereby granted and that the debtor, Ernest Newton Kalb, is ordered and directed, within ten (10) days

from and after the service on him of a copy of this order to surrender and deliver to Yellow Manufacturing Acceptance Corporation the following personal property, to-wit:

One GMC, Model No. CC-394, Motor Co. C22874060, Chassis No. 2654.

One GMC, Model No. CC-152, Motor No. B22894076, Chassis No. 2163." R. 18.

The complete order is at R. 17 to 18.

On October 30, 1941, the petitioner filed his said "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941" which states precisely the facts which raise the present issues here. R. 18 to 20.

On appeal the order of the district court was affirmed. R. 30 to 33. 127 Fed. (2d) 511. R. 34. Petition for rehearing denied R. 35.

## V.

### Specification of Errors.

The errors here specified were those of the bankruptcy court and of the appellate court which affirmed the final order of the bankruptcy court or the errors of the appellate court alone.

1.

The bankruptcy court failed to observe the procedure required by Section 75(o).

2.

The bankruptcy court erred in ordering the farmer debtor to surrender and deliver unconditionally to the mortgage holder his mortgaged property, thus removing

it from the sole jurisdiction, control, supervision and administration of the bankruptcy court in violation of Sections 75(e), (n), (o), and (p).

3.

The bankruptcy court erred in ordering the farmer debtor to surrender and deliver unconditionally to the mortgage holder his mortgaged property in violation of the general purpose of Section 75.

4.

The bankruptcy court erred in entering an order against the farmer debtor upon an application therefor which was presented without notice or knowledge on his part that such an application would be presented.

5.

The bankruptcy court erred in entering an order against the farmer debtor when he never had any knowledge or notice that an application therefor had been filed with the clerk prior to the presentation of said application to the court.

6.

The bankruptcy court erred in ordering the farmer debtor to surrender and deliver unconditionally to the mortgage holder his mortgaged property and thereby depriving him of the proceeds and use thereof.

7.

The bankruptcy court erred in surrendering its sole jurisdiction, control, supervision and administration of the property of the debtor involved in said order.

8.

The bankruptcy court erred in entering said order which would deprive the farmer debtor of his rights under Section 75 in respect to said property.

9.

The appellate court erred in assuming that the petitioner ever promised to make any payment to the respondent.

10.

The appellate court erred in holding that if the petitioner promised to make a payment to the respondent outside of the course of procedure provided in Section 75, and failed to do so, he could be penalized or punished by the bankruptcy court by being compelled to deliver his property unconditionally to the holder of a mortgage lien against it.

11.

The appellate court erred in holding that the bankruptcy court had any power to surrender its jurisdiction and control over the mortgaged property of the farmer debtor by abandoning it and ordering the farmer debtor to surrender and deliver said property to the holder of a mortgage lien against it.

12.

The appellate court erred in holding that the farmer debtor could be held to his proposal to creditors made pursuant to Section 75(a) to (r) when said proposal was never submitted by the conciliation commissioner to the creditors, never considered by the creditors, never accepted by any of the creditors, nor confirmed by the court.

13.

The appellate court erred in holding that the bankruptcy court could surrender and abandon its jurisdiction, control, supervision and administration over the property of the farmer debtor by ordering him to surrender it to the holder of a mortgage lien upon it for failure by said farmer debtor to make a payment in accordance with a proposal made to his creditors and filed with the conciliation commissioner but never submitted to the creditors, never accepted by any creditor, and never confirmed by the court.

14.

The appellate court erred in looking "only to ascertain whether there was abuse of discretion by the bankruptcy court." Quoted from the opinion of the appellate court near the end. R. 33.

15.

The appellate court erred in holding that the final order of the bankruptcy court "only affects possession." Quoted from the opinion of the appellate court near the end. R. 33.

16.

The appellate court erred in holding that Section 75(e), or any other part of Section 75 gives to the bankruptcy court power to control the possession of the property of the farmer debtor by transferring it to another "pending negotiations" under the provisions of Section 75(a) to (r) for composition or extension. The words quoted appear near the end of the appellate court's opinion. R. 33.

17.

The appellat court erred in holding that "Also in this picture was the debtor's efforts to avoid the hearing when the creditor sought an order from the court for the possession of the trucks." The quotation is from the end of the appellate court's opinion. R. 33.

## VI.

## SUMMARY OF THE ARGUMENT.

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**1.**

**The order of the bankruptcy court is void because the court had no power to issue it.**

**2.**

**Even though the bankruptcy court had possessed power to issue such an order, it was issued without due process of law and is therefore void for that reason also.**

## VII.

## ARGUMENT.

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**1.**

**The order of the bankruptcy court is void because the court had no power to issue it.**

The amount of property involved is not great but the principle involved is the entire aggregation of all the provisions and the purpose of Section 75. If this order stands, its application in any farmer debtor proceeding will wholly destroy the effect of the Act and of all the twelve unanimous decisions of this court over a period of seven years which have interpreted and sustained it and its purpose.

The effect of Section 75 is not to be measured by the number of petitions filed under it but by its effect and the effect of this court's interpretative decisions upon the countless mortgage holders who, because of them, do not press their mortgagors to desperation.

Of all devices which have been tried out to defeat the purpose of Section 75, the one employed here is the simplest, and the most expeditious, and temporarily at any rate, it is crowned with clean-cut success. The proceeding is not dismissed but it is nevertheless left an empty shell.

This device, never before employed so far as reported cases show, merely orders the farmer debtor "to surrender and deliver" to the mortgage holder the trucks on which it holds a mortgage. R. 18, top of page.

Lest it be claimed that there is a blind spot in the statute which does not envisage an order for direct and unconditional surrender and delivery by the farmer debtor of his mortgage chattels to the mortgage holder, the pertinent and immediately applicable portions of the statute are here copied:

> Section 75 (o): . . . "the following proceedings shall not be instituted" . . . "in any court **or otherwise**, against the farmer or his property" . . . [namely]: . . . "**Seizure, distress**" . . . "or other proceedings under" . . . "any" . . . "**lein, chattel mortgage, conditional sales agreement, or mortgage.**"
>
> Section 75 (p): "The prohibitions of subsection (o) shall apply to **all** judicial or official **proceedings in any court** or **under the direction of any official**, and shall apply to **all creditors**, public or **private**, and to **all of the debtor's property**," . . . **All such property** shall be

under **the sole jurisdiction and control** of the court in bankruptcy, and **subject to the payment of the debtor farmer's creditors as provided for in Section 75** of this Act."

Section 75 (n): "The filing of a petition" . . . shall immediately subject the farmer and all his property . . . for **all the purposes of this section,** to the **exclusive jurisdiction of the court,** including all" . . . "**personal property, or any equity or right in any such property**" . . .

Section 75 (e): . . . "After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such **control** over the property of the farmer as the court deems best in the interests of the farmer and his creditors."

The procedural facts in this case bring the prohibitions of the Act squarely in operation against them:

1. **The proceeding is pending between the filing of the petition and the disposition of the proposal** to creditors. The proposal has been made but never presented to the creditors or acted upon. The first creditors' meeting stands adjourned subject to the call of the conciliation commissioner. R. 13 to 15, R. 15, R. 16, folio 20, R. 4 to 5, folio 5.

2. The proceeding of the respondent was instituted for the **seizure and distress of the farmer debtor's property.** R. 17 to 18, folio 21 and 22.

3. It was a proceeding in court by a **creditor** seeking the **debtor's property by distress.**

4. It took that property from the **sole jurisdiction and control of the court** and conferred it unconditionally to the mortgage holder where it was not **subject to the payment of the farmer debtor's creditors as provided in Section 75.**

5. It deprived the court for **all purposes of Section 75** of the **exclusive jurisdiction of the court.**

The reason for these unusual and carefully guarding protective measures was no doubt to retain in all but the most unusual circumstances the property in the jurisdiction of the bankruptcy court, and yet to make it possible for an exception to be made for highly perishable property such as, for example, fruits, vegetables, or goods in transit, etc.

This court said in *Adair* v. *Bank* (1938), 303 U. S. 350, at pages 356 and 357 that Section 75(e) and (n) provides for "control" of the property and that "These provisions look toward the maintenance of the farm as a going concern" . . . In that case the question was whether the proceeds of a crop should go to the holder of a mortgage on the crop. This court said they should not, but should be devoted to making the farm a going concern. And at page 360: "The filing of his petition put the property in the control of the court and the harvesting of the crop and the **preservation of the property** became a matter for the concern and action of the court."

All of the decisions of this court and of the appellate courts cited in the petition herein at pages 8 to 13 are against any interpretation of Section 75 and its purpose which would under any circumstances justify the order of the bankruptcy court which the appellate court below sustained. No reported decision will lend any aid or comfort to the respondent in seeking support for the order.

The record will be searched in vain for a single citation of any decision by either the district court or the appellate court which would even indirectly sustain the order. Nor has the respondent either in the district court or in the appellate court suggested any such authority.

Indeed it is probable that the order was sought and obtained upon the theory that the property involved is so small that the petitioner would suffer the emasculation of

the law rather than undertake its defense and the defense of his rights, or that if he did, this court would consider the issues too insignificant for notice.

It is to be particularly noted that even in a proceeding pending under regular bankruptcy where there is no provision for rehabilitation but a quick dispossession of the bankrupt, and distribution of his property among his creditors, and where there is no specific prohibition to match any of the several found in Section 75, this court has firmly required that the bankruptcy court must retain the estate in its jurisdiction and administer it, declaring that a bankruptcy court may not abandon the property or surrender its jurisdiction. Of the four decisions by this court on this subject cited at page 11 of the petition herein three of them involved regular bankruptcy before any farmer debtor legislation had been enacted. The fourth, decided in 1940, involved a railroad debtor proceeding under Section 77 in which there is no prohibition matching any of those in Section 75.

It is therefore asserted that the order of October 20 was void from its entry because the bankruptcy court lacked the power to issue it.

2.

**Even though the bankruptcy court had possessed power to issue such an order, it was issued without due process of law and it is therefore void for that reason also.**

(1)

The procedure by which the order was sought and obtained was in violation of the specific process prescribed in Section 75(o) that:

> "**Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner,** the following proceedings shall not be instituted" . . .

Five distinct procedures are required by this provision before any property of the farmer debtor may be interfered with while a proceeding is pending for composition or extension. They are:

1. A petition made to the judge,
2. referred to the concilation commissioner for hearing,
3. made the subject of a hearing before the conciliation commissioner,
4. reported back after hearing by the conciliation commissioner to the judge,
5. and granted by the judge after he has had an opportunity to examine the results of the hearing and the report of the conciliation commissioner.

These detailed requirements and the other repeated general statements of purpose contained in Section 75(e), (n), and (p), emphasize the intention of the Act that none but the gravest reason would justify any modification of the proceeding that would interfere with the right of possession, use and opportunity for redemption in the farmer debtor.

None of these five requirements was observed. The petition was not made to the judge but referred by the conciliation commissioner. Clerk's docket entry of July 30, 1941. R. 2. It was not referred to the conciliation commissioner by the judge for hearing. R. 17, folio 21. There was no hearing before the conciliation commissioner. R. 4, folio 5; R. 18 to 19, folio 21. It was not, of course, reported back after hearing by the conciliation commissioner to the judge. And finally it was not granted by the judge after he had considered the evidence of a hearing before the conciliation commissioner and the recommendation or report of the conciliation commissioner.

It is very clear that if the order sought had been one which the Act would permit, the method of obtaining it

was in violation of the mandatory requirements laid down and therefore such an order would have been in vain.

(2)

But in a larger sense the order was void because in obtaining it, that due process of law was violated which is required by the Fifth Amendment.

The method employed is clearly stated in the farmer debtor's "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941" at R. 18 to 20, beginning at folio 23. They are:

1. No notice was given that an application for the order has been filed with the clerk.

2. No notice was given that it was set down for hearing.

3. A notice of hearing of an entirely different matter, involving real estate, not chattels, and involving different creditors, not including the respondent, was received.

(4 and 5. The noticed matter was heard and taken under advisement.)

6. Counsel for the respondent asked the judge for the order and counsel for the petitioner explained to the judge that no notice or knowledge of the filing of the application had been given to or possessed by the debtor or his counsel, or that it was set for hearing, and that he could not submit himself to the jurisdiction of the court to hear it.

7. That neither the petitioner nor his counsel had any other knowledge of the order until it was served after its entry.

What due process of law is has often been explained. The statement in 6 Ruling Case Law, "Constitutional Law," Section 442, is as good as any:

> "The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case."

It quotes Daniel Webster's definition, which was noted by Judge Cooley, as:

> "A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

It sums up the definition by saying:

> "It is a rule as old as the law that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is fairly administered."

Adequate preliminary notice of the subject and of the time and place of its hearing are required so that preparation may be made and the presence of witnesses secured.

In *Holden* v. *Hardy* (1898), 169 U. S. 366, 389, this court declared:

> "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense."

In *Galpin* v. *Page* (1874), 85 U. S. (18 Wall.) 350, this court said at page 368:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression and never can be upheld where justice is justly administered."

*Williamson* v. *Berry* (1850), 49 U. S. (8 How.) 495, 541:

> "But if it [a court] act without authority, its judgments and orders are nullities; they are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them; they constitute no justification, and all persons concerned in executing such judgments, or sentences, are considered in law as trespassers.
>
> This distinction runs through all the cases on the subject."

In *Sheets* v. *Livy*, C.C.A. 4 (1938), 97 Fed. (2d) 674, during the days when the farmer debtor cases were being dismissed for "lack of good faith" before this court decided *John Hancock* v. *Bartels* (1939), 308 U. S. 180, the appellate court declared there was abundant evidence "most of which was given by the debtor himself" justifying dismissal of the proceeding but held that:

> "The District Judge was nevertheless in error in denying the amended petition and dismissing the proceedings for two reasons. It was improper, no matter how strong the evidence of lack of good faith, to take this action without notice to the debtor and an opportunity to be heard."

*In re Rosser* C.C.A. 8 (1900), 111 Fed. 106, a referee in bankruptcy issued notice of a first creditors' meeting, and the bankrupt received the notice. At the meeting the bankrupt was examined, and at the conclusion of the examination the referee issued an order upon the bankrupt to turn over $2,500 to the trustee. In its decision the Circuit Court of Appeals said:

> "Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examination of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the question of law which it involved. It considers without notice, condemns without hearing, and renders judgment without trial. The order of the referee was unlawful and void."

*Boyd* v. *Glucklich,* C.C.A. 8 (1902), 116 Fed. 131 and *In re Frank,* C.C.A. 8 (1910), 182 Fed. 794, are essentially the same. In one of them two days' notice was given which the court held to be inadequate.

The last three cited decisions were grounded upon *Galpin* v. *Page,* 85 U. S. (18 Wall.) 350, quoted above at page 31 of this brief.

Reported cases do not show any instance of a violation so clear as this of that due process which is guaranteed by the Fifth Amendment.

## 3.

### The Order Examined.

R. 17 to 18, folio 21 and 22

Some peculiarities of the order of October 20 are:

1. **No mention** is made **of the filing of the petition** for the order or of any notice. The filing was on July 30 **after** notice was given on July 21 of the hearing of the real estate matter. The **date of verification** of the petition on July 19 **is given**; it **preceded** the notice of July 21 by two days.

2. It avoids stating that any **evidence or argument** was heard. It merely says the YMAC was **represented** by its attorney, and "the debtor and his attorney" **being present**, and the court having heard the statements of counsel and "upon all the papers, files and proceedings had herein," it appearing at the YMAC is entitled to the relief prayed for.

3. It is entered not upon the evidence, but "upon motion" of the attorney for the YMAC, etc.

The proponent of the order who drafted and presented it to the Court undoubtedly was aware of its weakness. The significance of these peculiarities is apparent.

## 4.

### The Opinion of the Appellate Court Examined.

R. 30 to 33

1. R. 30: "On July 20, 1941, appellee filed its petition with the conciliation commissioner." There is no evidence in the record that such a petition was so filed on July 20.

2. R. 31: (1) "It is also **argued** that debtor's attorney was apprised of the filing of the appellee's petition with the conciliation commissioner." (2) "Convinced as we are that **debtor was informed of appellee's petition,** we come directly to the debtor's excuses for failure to make the **payments he agreed to make.**"

Twice in this quotation a subject is mentioned that may have two different aspects, and it is assumed later in the opinion that one aspect is exclusively the true one.

(1) The record is devoid of any evidence that the petitioner or his attorney was informed of the filing of the YMAC petition until it was presented on August 5, 1942. In the YMAC **brief** in the appellate court it was **"argued" de hors the record,** that certain correspondence concerning a document forwarded to the petitioner's counsel proved that he knew it was **filed,** or was to be filed. The entire correspondence on the subject would show that the petitioner's counsel strenuously maintained that a **"proposed petition"** was not within the conciliation commissioner's power to entertain and should not be filed. And it also referred to a blank form of **"proposed 'Order to Show Cause'"** (to which the **proposed** petition was **annexed**) which so far as is known, never was filled out or signed, and **never was filed anywhere.** Said proposed order provided for service of the order and of the proposed annexed petition. The proposed "Order to Show Cause" and the proposed petition were never served by the conciliation commissioner as requested.

Any evidence on this subject that might have been introduced into the record would have left it precisely as it is—namely that neither the petitioner nor his counsel ever had any notice or knowledge that the respondent's petition was ever filed anywhere until its counsel presented it to the judge on August 5, 1941.

(2) Later in the opinion the words, **"payments he agreed to make"** are treated as if referring to the farmer debtor's proposal to creditors filed with the conciliation commissioner. His proposal is at R. 13 to 15. Again they are treated as if referring to correspondence which the respondent introduced into its brief **de hors the record.** (*e.g.* R. 33: "good faith of his promises"; "promises *v.* non-action"; "Debtor made a promise"; "The payments so promised however were not forthcoming"; "proposed to change the terms of debtor's promise"; "Creditor was interested in payments, not in promises"; "The district court was justified in considering debtor's promises"; "his failure to keep the promises"; "his efforts to change the promises".

As the most cursory reading of Section 75 discloses that the proposal to creditors is not effective until **accepted by creditors** (as this one was not) **and confirmed by the court,** (as it was not), and the first principle of the law of contracts is that an offer (if the letter of July 2 lugged in **dehors the record** contains an offer), is not even an obligation **until accepted,** it is believed no further comment is necessary anent the **"payments he agreed to make."**

3. R. 32: "His contention that he has been denied his property without due process of law, i.e., **notice is frivolous."**

After again referring to correspondence (being only part of all the correspondence on the subject), which was quoted in its **brief** by the respondent **dehors the record,** the opinion says debtor's letter acknowledges receipt of the **"petition for surrender of the trucks"** and "he filed no objection thereto." Here again we have an example of that term of the subject of Logic called "An undistributed middle."

The correspondence which was referred to **did not** acknowledge receipt of a petition for surrender of the trucks. Reference was made to a blank form of "**proposed** Order to Show Cause" and a "**proposed** Petition" annexed to it. There was no information that either **was to be** filed or **was** filed. Strenuous objections were made, in the same incomplete correspondence **dehors the record** which the opinion took from respondent's brief, that the conciliation commissioner had no authority to entertain either the proposed order to show cause or the proposed petition. As the proposed blank form of "Order to Show Cause" was never filled out and **served** with the "annexed Petition" by the conciliation commissioner the petitioner was justified in believing that neither was **filed.**

4. R. 32, At note ** at bottom of page: "The **letter of debtor's counsel** showed **conclusively** that the debtor's statement to the court that he was unaware of the **existence of the petition, was untrue.**"

Here again the opinion is unclear about the subject of its remarks. The "letter of debtor's counsel" may be a letter to the conciliation commissioner or a letter to counsel for respondent. The letter to counsel did not acknowledge receipt of any petition. A letter to the conciliation commissioner stated he had received from respondent's counsel a "**proposed order to show cause**" and a "**proposed petition.**" Neither are in the record. They were that **part only** of certain correspondence which the respondent quoted in its brief in the appellate court.

The "debtor's statement to the court" is in the "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941." Paragraph 6, R. 19 to 20.

There is nothing in the record or in the incomplete correspondence, foreign to the record, which was inserted in the respondent's brief to the appellate court, to support the statement that the "debtor's statement to the court that he was unaware of the existence of the petition, was untrue."

All of the "statement to the court" found in not only paragraph 6 but in all seven paragraphs of the petitioner's "Exceptions and Objections of Farmer Debtor to Order Entered October 20, 1941" at R. 18 to 20, stands unchallenged **by the record** or by any correspondence or by **any fact.** They are:

1. Petitioner **never had any notice** that any such YMAC petition had been filed with the clerk.
2. **Nor that it was ever set for hearing.**
3. **Notice of the hearing of the real estate petition and no other** was received prior to August 5 when the truck petition was presented.
4. The real estate hearing set for August 4 was continued to August 5.
5. The real estate matter was heard on August 5.
6. On August 5 counsel for the YMAC presented the truck petition and upon invitation of the Judge, counsel for the petitioner said:
   (a) No notice of the filing of said petition had ever been served on the petitioner or his counsel.
   (b) None of them had any knowledge of its filing.
   (c) No notice or knowledge was had by any of them that it was set for hearing or would be heard anywhere at any time.
   (d) The petitioner could not submit himself or the subject to the jurisdiction of the court as he would be deprived of his due process of law.

7. The first knowledge of said order of October 20 came to the petitioner and his counsel on October 23.

## VIII.

## CONCLUSION.

The order, sustained by the appellate court, should be reviewed by this court because:

The construction of a federal statute is involved.

An important question of procedure under a federal statute should be decided.

The Circuit Court of Appeals below has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter.

It has decided an important question of federal law not settled by this court.

Its decision conflicts with applicable decisions of this court on the statute involved.

Its decision conflicts with principles of long established general law.

It has sanctioned a departure from the usual course of judicial proceedings by the bankruptcy court.

Respectfully submitted,

ELMER MCCLAIN,
*Counsel for the Petitioner,*
*Newton Kalb.*

Lima, Ohio
August 19, 1942.